

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GREAT NECK SERVICE STATION, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1979	:	
through August 31, 1982.	:	

Petitioner, Great Neck Service Station, Inc., 265 East Shore Road, Manhasset, New York 11030, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1979 through August 31, 1982 (File No. 44422).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 14, 1986 at 1:15 P.M., with additional documentation and briefs to be submitted by petitioner by March 20, 1987. Petitioner appeared by Robert M. Markman, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Michael Infantino, Esq., of counsel).

ISSUE

Whether a sales tax audit properly determined the amount of sales and use taxes due from petitioner.

FINDINGS OF FACT

1. Petitioner, Great Neck Service Station, Inc., operates a Chevrons service station at 265 East Shore Road, Manhasset, New York. Petitioner conducted the same business during the period at issue. Alfred Balterman is, and was, president of petitioner.
2. Petitioner sold Chevron brand gasoline and oil, tires, batteries and accessories, and performed repair and towing services. The station had three service bays. Petitioner had two tow

trucks registered in its name, and a third truck, which was apparently based at the station, was registered in the name of Scott Balterman, son of petitioner's president.

3. The sales tax field audit was commenced on April 9, 1982, when the auditor made an unannounced visit to the station. A letter left with petitioner announced that petitioner's sales tax returns had been scheduled for a field examination and notified petitioner of an appointment date. The letter stated, in pertinent part, as follows:

"All books and records pertaining to your Sales Tax liability for the period under audit should be available. This would include journals, ledgers, Sales invoices, purchase invoices, cash register tapes, exemption certificates and all Sales Tax records. Additional information may be required during the course of the audit."

4. The records made available to the auditor were as follows:

- a) Sales tax returns and related worksheets;
- b) Federal and State income tax returns;
- c) Cash receipts journal;
- d) Sales invoices (test period);
- e) Check disbursements journal; and
- f) General ledger.

Records not made available were:

- a) Purchase invoices;
- b) Cash register tapes; and
- c) Towing sales invoices.

5. In view of the fact that the auditor was not given purchase invoices, cash register tapes, or towing sales invoices, she determined that petitioner's records were inadequate to conduct a complete audit. Accordingly, external indices were used to derive taxable sales using markups on purchases in various categories.

6. Petitioner's Federal income tax returns were compared to its sales tax returns and it was found that the gross receipts per the Federal income tax returns were greater than gross sales as per the sales tax returns:

<u>Period</u>	<u>Gross Receipts (Per Income Tax Returns)</u>	<u>Gross Sales (Per Sales Tax Returns)</u>	<u>Difference</u>
9/1/79-8/31/80 \$135,780.00	\$536,751.00	\$400,971.00	
9/1/80-8/31/81	445,863.00	382,182.00	63,681.00

7. The auditor reviewed petitioner's sales tax worksheets for the quarter ending

November 30, 1981 and found that petitioner did not use the recorded sales as per the cash receipts journal to prepare the sales tax return.

8. Gasoline purchases verification for the test period September, October and November 1981, received from petitioner's supplier, California Petroleum, confirmed that petitioner had accurately reported gallons purchased and petitioner's purchases per books were thus accepted for audit purposes. Purchases per books and per Federal income tax returns substantially agreed.

9. The markups were calculated as follows:

(a) Gasoline purchases (less excise taxes) were marked up 15 percent, based on office experience as to the average markup of other stations in the area, resulting in audited taxable gasoline sales of \$1,062,771.00.

(b) Motor oil purchases were marked up 82 percent, based on office experience with similar stations. Oil repair sales (oil changes) for February 1982 were analyzed and extrapolated over the audit period to arrive at \$3,162.00 in oil purchases. Based on office experience, it was assumed that one quart of oil was sold at the pump for every five used in an oil change, resulting in an additional \$527.00 in purchases for the audit period. After the markup of 82 percent, audited taxable oil sales were found to be \$6,714.00.

(c) Tires, batteries and accessories (including repairs) were determined as follows:

(i) Petitioner's cash disbursements showed "parts and supplies" of \$51,424.00 for the period June 1, 1979 through February 28, 1982. Petitioner's accountant stated that approximately \$10,000.00 represented tires and \$5,000.00 represented batteries. The balance was allocated to parts.

(ii) Tires and batteries were marked up 41 percent, based on petitioner's records for February 1982, resulting in \$14,100.00 in audited taxable sales of tires and \$7,050.00 in audited taxable sales of batteries.

(iii) Parts were marked up 100 percent, based on an analysis of petitioner's records for February 1982, resulting in audited taxable parts sales of \$72,848.00.

(iv) Labor sales were determined to be equal to 80 percent of parts sales, based on an

analysis of petitioner's records, resulting in \$58,278.00 in audited taxable labor sales.

10. "Other income" from petitioner's records for June 1979 through February 1982 was \$300,906.00 for the audit period. Petitioner's accountant stated that this represented credit card payments from Chevron. Verification was requested by the auditor but not received.

Accordingly, the "other income" was deemed to be taxable sales.

11. Towing performed for the American Automobile Association (AAA) for the period June 1, 1979 through February 28, 1982 was recorded on the books as \$156,843.00 and was deemed to be taxable.

12. Audited taxable sales for the period June 1, 1979 through February 28, 1982 (Findings of Fact "9" through "11", supra) were found to total \$1,679,510.00. Reported taxable sales for the same period were \$1,038,263.00, a difference of \$641,247.00, resulting in an error percentage of 61.76 percent. This percentage was applied to reported taxable sales for the audit period, as extended to August 31, 1982, resulting in additional sales tax due of \$54,935.06. Analysis of fixed assets resulted in use tax determined to be due of \$62.09.

13. On July 20, 1982, petitioner's accountant, acting under a power of attorney, executed a consent extending the period of limitation for assessment for the period June 1, 1979 through May 21, 1980, to June 20, 1983.

14. On March 18, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner for the period June 1, 1979 through August 31, 1982 in the amount of \$54,997.15 in additional tax due, \$11,467.17 in penalty due, plus \$13,221.02 in interest, for a total of \$79,685.34.

15. Petitioner contends that its records are complete and correct and that therefore the markups used were inappropriate; that the "other income" consisted of payments by Chevron with respect to credit card sales, thus resulting in duplication of sales included in the audit; and that certain towing was for resale and therefore exempt. Petitioner offered to submit documentation after the hearing to support its position and was granted time to do so. Petitioner's time to submit such documentation was eventually extended to March 20, 1987;

however, no such documentation was ever submitted by petitioner.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides, in pertinent part, as follows:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That where a taxpayer's records are incomplete or insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous. (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858.)

C. That petitioner's records were incomplete and insufficient since purchase invoices, cash register tapes and towing sales invoices were not produced for audit. It is also noted that the substantial discrepancy in gross receipts as per the Federal income tax returns and gross sales as per the sales tax returns was never explained. Accordingly, it was proper for the Audit Division to perform a markup audit resulting in the assessment issued herein.

D. That petitioner has not sustained its burden of proof to show that the assessment was erroneous. Petitioner's failure to produce the documentation promised at the hearing is particularly noteworthy. For example, the "other income", if actually credit card payments from Chevron, presumably could have been verified through Chevron. Absent Chevron's cooperation, a subpoena could have been obtained and served. In view of the fact that said documentation has not been submitted, the testimony of petitioner's president and accountant with respect to the alleged facts on which petitioner's contentions (Finding of Fact "15") are based is found to be incredible.

E. That the petition of Great Neck Service Station, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 18, 1983 is sustained.

DATED: Albany, New York
May 26, 1988

ADMINISTRATIVE LAW JUDGE